IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-71

LOS ANGELES TIMES, a division of THE TIMES MIRROR COMPANY, PAUL CONRAD, THE TIMES MIRROR COMPANY, a corporation, OTIS CHANDLER, ANTHONY DAY, *Petitioners*

v.

FRED L. HARTLEY, *Respondent*

MOTION OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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MOTION OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The American Newspaper Publishers Association (hereinafter "ANPA") respectfully moves this Court for leave to file the accompanying Brief Amicus Curiae in support of the Petition for Writ of Certiorari filed herein. The Petitioners have consented to ANPA's filing of a brief amicus curiae; the Respondent has declined to do so.

The opinion of the California Court of Appeal for the Second Appellate District, with review thereof denied by the Supreme Court of California, places itself squarely athwart the proper administration of justice

in the field of libel law by reducing the exercise of appropriate summary judgment proceedings to a useless charade. Your amicus fully recognizes the importance of a litigant's day in court in order to prove his or her case. Just as importantly, the litigant defending a case is entitled to use the appropriate court procedures as set forth in the federal rules and in the state court rules of procedure to dispose of meritless litigation in summary fashion rather than be harrassed into large money settlements in order to avoid the cost of expensive trials, or even worse, in the field of the First Amendment, be forced into a status of timidity in approaching its service to the people of this county of providing uninhibited reporting. Obviously, American Newspaper Publishers Association has a deep and abiding interest in seeing that the people of the United States are afforded full and complete reporting and editorial comment as depicted in the cartoon in question here, without fear that someone aggrieved by same can bring a lawsuit which must be tried rather than summarily dismissed when clear-cut constitutional principles cry for its dismissal.

The American Newspaper Publishers Association is a non-profit membership corporation organized and existing under the laws of the Commonwealth of Virginia. Its membership consists of more than 1,140 newspapers representing over ninety percent of the total daily and Sunday newspaper circulation in the United States. A recent bylaw change has allowed an increasing number of non-daily newspapers to join ANPA. The Los Angeles Times, one of the Petitioners involved in this proceeding, and sixty other daily newspapers throughout the state of California hold membership in ANPA.

Concerned with matters of general significance to the profession of journalism and the newspaper publishing business, ANPA seeks to keep its members abreast of matters touching on these concerns. In that regard, the Association's member newspapers, individually and through ANPA, are ever vigilant to protect the public's right, under the First Amendment, to information concerning matters of public interest. ANPA and its members are vitally interested in protecting the public's right to receive, and the right of the press to publish, robust editorial comment and criticism regarding matters of public interest. ANPA therefore is concerned lest the full breadth of the constitutional guarantees of freedom of speech and of the press in the context of libel law not be applied to political cartooning, which historically has been an important means of expressing protected social comment and criticism.

Ever since its 1964 decision in the case of *New York Times Co.* v. *Sullivan,* 376 U.S. 254, the Supreme Court has been caught in what at least one Justice has called a "quagmire in the field of libel," *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130, 171 (1967) (Black, J., dissenting opinion), seeking to define "the proper accommodation between the law of defamation and the freedoms of speech and press," *Gertz* v. *Welch,* 418 U.S. 323, 325 (1974). This effort began with the adoption of the "actual malice" test, whereby it was held that a public official plaintiff, in order to prevail in a libel action, must show with convincing clarity that the defendant has published a defamatory statement "with knowledge that it was false or with reckless disregard of whether it was false or not," 376 U.S. 279-280. In 1967 the Supreme Court extended this constitutional

privilege to allegedly defamatory publications relating to "public figures," that is, persons who purposely thrust themselves "into the vortex of an important public controversy." *Curtis Publishing Company* v. *Butts* and *Associated Press* v. *Walker,* 388 U.S. 130, 154 (opinion of JJ. Harlan, Clark, Stewart and Fortas).

In addition to its application of the *New York Times* standard of fault to both defamation of public officials and defamation of public figures, in order "to give effect to the [First] Amendment's function to encourage ventilation of public issues," *Rosenbloom* v. *Metromedia,* 430 U.S. 20, 46 (1971), the Supreme Court has emphasized that before a defendant may be held liable for deliberately, or with reckless disregard, defaming a public figure the published statement must be found to contain false statements of fact, and not mere opinion or ideas expressed through rhetorical hyperbole or figurative epithet. See, *Old Dominion Branch No. 496* v. *Austin,* 418 U.S. 264 (1974); *Greenbelt Cooperative Publisher's Association* v. *Bresler,* 398 U.S. 6 (1970). In the case sought to be presented to this Court by Petitioners, the Court of Appeal of the State of California for the Second Appellate District misapplied the relevant state and federal law in overturning the trial court's grant of Petitioners' Motion for Summary Judgment, and thereby offended the "proper accomodation" between the law of defamation and freedom of the press under the U. S. Constitution.

In the decision herein the Court of Appeal, applying a standard of "possible [defamatory] implication," found the political cartoon in question, which expressed a critical comment and opinion on public issues and public figures, to give rise to a defamatory implication

which, in fact, is directly contrary to the factual imputation contained in the written caption of said cartoon.

In addition, the Court of Appeal completely ignored the insufficiency of Respondent's evidence to show actual malice on Petitioners' part, and reversed the grant of summary judgment merely because Petitioners failed to demonstrate a factual basis for what the court deemed a "possible [defamatory] implication." This of course is erroneous and contrary to the requirements under *New York Times* since even assuming, arguendo, that the cartoon both conveys a factual inaccuracy and injures Respondent's reputation, Respondent still is required to show by "clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for truth." *Gertz* v. *Welch,* 418 U.S. 323, 342 (1974).

Finally, the decision of the Court of Appeal to reverse the grant of summary judgment in this proceeding adds to the confusion and conflict among the various states and lower federal courts as to the role of summary judgment in expediting the disposition of libel actions on their merits. Various jurisdictions, mindful that even the threat of costly litigation and defense against sham libel claims may be chilling to the exercise of First Amendment freedoms, approve the grant of summary judgment in libel actions. See, *Guam Federation of Teachers, Local 1581, A. F. T.* v. *Ysrael,* 492 F.2d 438, 441 (9th Cir. 1974); *Treutler* v. *Meredith Corp.,* 455 F.2d 255, 257 (8th Cir., 1972, per Hunter, J.); *Time, Inc.* v. *Johnston,* 448 F.2d 378 (4th Cir., 1971); *Bon Air Hotel, Inc.* v. *Time, Inc.,* 426 F.2d 858 (5th Cir., 1970); *Wasserman* v. *Time, Inc.,* 424 F.2d 920 (D. C. Cir., 1970) [concurring opinion]; *Buchanon* v. *Associated Press,* 398 F. Supp. 1196 (D.C.D.C. 1975);

Guitar v. *Westinghouse Electric Corp.*, 396 F. Supp. 1042, 1053 (S.D.N.Y. 1975); *Meeropol* v. *Nizer*, 381 F. Supp. 29 (S.D.N.Y. 1974); *Cardillo* v. *Doubleday & Co.*, 366 F. Supp. 92 (S.D.N.Y. 1973); *LaBruzzo* v. *Associated Press*, 353 F. Supp. 979 (D.C. Mo. 1973); *Konigsberg* v. *Time, Inc.*, 312 F. Supp. 848 (S.D.N.Y. 1970); *Cerrito* v. *Time, Inc.*, 302 F. Supp. 1071 (N.D. Col. 1969); *Belli* v. *Curtis Pub. Co.*, 25 Cal. App. 3d 834 (1972).

In contrast, a substantial number of jurisdictions expressly disfavor summary judgment where the issue of malice—which calls a defendant's state of mind into question—is raised. See, *Ragano* v. *Time, Inc.*, 302 F. Supp. 1005, 1010 (D.C. Fla. 1969) (per Krentzman, J.), affirmed 427 F.2d 219 (5th Cir. 1970); *Goldwater* v. *Ginzburg*, 261 F. Supp. 784, affirmed following decision on the merits, 414 F.2d 324 (2nd Cir. 1969), cert. den. 396 U.S. 1049; *Fignole* v. *Curtis Pub. Co.*, 247 F. Supp. 595 (S.D.N.Y. 1965); cf. *Poller* v. *C.B.S., Inc.*, 368 U.S. 464 (1962). The disagreement among the various state and federal courts over whether the news media, as defendants in literally thousands of libel actions, may appropriately seek and obtain disposition of these actions by means of summary judgment on the issue of actual malice, cries for the input and guidance of this Court.

Therefore a decision from this Court, delineating more fully the burdens of proof to which, in a libel action, the respective parties in a motion for summary judgment are to be held, and clarifying for emphasis the distinction between the dual requirements under *N. Y. Times*—i.e., a showing of (1) both falsity and injury to reputation, and (2) clear and convincing proof of actual malice—can eliminate the chill on the

exercise of First Amendment freedoms caused by the practical requirement in libel actions in many jurisdictions that the press either offer settlement or be called to defend at trial, due to the relative unavailabiilty of summary judgment.

Because of the importance of the issues sought to be presented to this Court by the Petition for Writ of Certiorari, ANPA desires to present to the Court, for its assistance, its view on the important matters in this proceeding.

WHEREFORE, American Newspaper Publishers Association respectfully requests this Court to grant this motion and permit them to file the Brief Amicus Curiae attached hereto and submitted herewith.

Respectfully submitted,

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v.

FRED L. HARTLEY, *Respondent*

BRIEF OF AMICUS CURIAE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

PRELIMINARY STATEMENT

The American Newspaper Publishers Association (hereinafter "ANPA") submits this brief amicus curiae in support of Defendants Paul Conrad, The Times Mirror Company, Los Angeles Times, Otis Chandler, Anthony Day, in their Petition for Writ of Certiorari.

INTEREST OF THE AMICUS CURIAE

The Los Angeles Times and sixty other daily newspapers published throughout the state of California hold membership in ANPA. Concerned with issues of general significance to the profession of journalism and the daily newspaper publishing business, ANPA seeks to keep its members abreast of matters touching on these concerns. In that regard, the Association's member newspapers, individually and through the ANPA, are ever vigilant to protect the public's right under the First Amendment to information concerning the activities of government and matters of public interest.

The decision of the Court of Appeal of the State of California for the Second Appellate District in this cause of action constitutes another example of judicial misapplication of the legal principles regarding the scope of traditionally privileged fair comment and the qualified constitutional privilege extended to publications in cases involving the defamation of public officials or public figures, so painstakingly set forth by this Court in *New York Times* and its progeny. It cannot be denied that, inasmuch as the California Court of Appeal's decision under challenge herein merely reversed the trial court's grant of summary judgment, were this Court to refuse to accept and consider the substance of Petitioner's claims, Petitioner would not necessarily be precluded thereby from ultimately prevailing in the underlying libel action. The decision of the Court of Appeal, however, does injury to the free exchange of ideas and opinion countenanced by the First Amendment far more serious than merely requiring Petitioners herein to go to trial and defend against Respondent's claim, as costly and time

consuming as that may be. Rather, the Court of Appeal's decision involves a fundamentally invalid interpretation of legal principles forged in the substantive law of libel. Moreover, it becomes another in a substantial number of decisions wherein summary judgment, either expressly or by implication, has been disfavored and has been eroded as a practical means of resolving libel actions on the merits.

It is the hope of ANPA that a definitive decision by this Court reimposing summary judgment in this case, where it so clearly is warranted, and reaffirming the elements of proof under the *New York Times* standards which must be shown by a plaintiff in order to successfully maintain a libel action in the face of a defendant's motion for summary judgment, will halt the steady encroachment on the availability of summary judgment as a just means for summary disposition of libel claims wherein no disputed questions of fact exist. Because of the importance of this issue to ANPA, its members, and all persons who, through comment and critical discussion on issues of public significance, run the risk of being put to the defense in a libel action, ANPA desires to present to this Court, for its assistance, its views in regard to the important issues involved in this proceeding.

ARGUMENT

At the outset it must be pointed out that ANPA strongly supports and adopts the position of Petitioners herein. ANPA believes that the Petitioners' brief accurately and forcefully sets forth the background of this case, delineates the errors and misinterpretations of constitutional dimension contained in the opinion of the California Court of Appeal for the Second Ap-

pellate District, and persuasively presents legal reasoning and authority demonstrating the First Amendment protections which the Petitioner should have been accorded in the appeal proceeding below.

ANPA wishes to emphasize that grave errors have been committed by the California Court of Appeal in analyzing and ruling on significant issues related to the substantive law of libel. The court's well-intentioned but misguided concern that Respondent's claim be given a full and fair hearing on the merits has effectively annulled the Constitutional protections owed to the defendant under *N. Y. Times* v. *Sullivan* and its progeny.

The Standard Employed by the California Court of Appeal To Determine that Petitioners' Cartoon Was Defamatory in Nature Offends Both the Relevant Law of the State of California and the Constitutional Standards Enunciated in Greenbelt Coop. Pub. Ass'n v. Bresler and Old Dominion Branch No. 496 v. Austin

The major portion of the California appeal court's opinion below is devoted to the application of *MacLeod* v. *Tribune Pub. Co.*, 52 Cal. 2d. 536 (1959), to the present case. Therein, the Court discussed which standard is applicable in analyzing the threshold issue in every libel action—vis., whether the publication, by its terms, is defamatory in nature. The Court focused its reliance on a faulty interpretation of *MacLeod* v. *Tribune Pub. Co., supra,* and failed to consider federal constitutional libel law which, in view of the appeal court's acknowledgment of Hartley as a "public figure," clearly pre-empts state law. See, *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974); *Greenbelt Coop. Pub. Ass'n* v. *Bresler,* 398 U.S. 6 (1970); *Associated Press* v. *Walker* and *Curtis Pub. Co.* v. *Butts,* 388 U.S. 130

(1967); *Cepeda* v. *Cowles Magazines,* 392 F.2d 417 (9th Cir. 1968).

The court interpreted the holding of *MacLeod* to mandate denial of summary judgment where a publication may reasonably be held to "contain *a possible defamatory meaning* when viewed by the eyes of the average reader." Petitioners' Appendix A, p. 3; (emphasis added). Under the guidance of this spurious interpretation of *MacLeod,* the Court held that it could not as a matter of law find the Respondent was not defamed. This judgment was made, however, despite the fact that the court was unable to find in the political cartoon in question a single false statement of fact, which clearly is required under federal libel law. The only "fact" stated in the cartoon was its caption, wherein the federal government was accurately charged with responsibility for diverting 500,000 barrels of Union Oil's crude from Southern California to Guam. Nevertheless the court pointed out that in view of the fact that the "general tone of the cartoon" was not charitable toward Respondent and the cartoon actually invited persons to "think the worst" of Respondent, there may be certain viewers who nevertheless would construe the cartoon to charge Respondent with responsibility for the diversion order. Petitioner's Appendix A, p. 6.

Such a tortured interpretation of the cartoon and the utilization of a "possible [defamatory] implication" standard to reverse the trial court's grant of summary judgment below patently ignores the relevant state and federal law in respect of the defamatory nature of false ideas, critical opinions, and rhetorical hyperbole.

Turning first to a California state case, *Yorty* v. *Chandler,* 13 Cal. App. 3d 469 (1970), the court there makes it clear that where an allegedly defamatory publication contains rhetorical hyperbole or patently exaggerated epithets, and the reader may reasonably be held to discern it as such, liability will not lie, despite the fact that the possibility of a defamatory construction may still exist:

> "Because a political cartoon presents critical opinion in imaginative and symbolic form, in claimed instances of defamation a court must ferret out the underlying themes of the cartoon and then determine whether these can *reasonably* be considered libelous. [citations omitted]"

13 Cal. App. 3d. at 472; (emphasis added).

In that case, the mayor of Los Angeles had been lampooned for his publicly expressed aspirations for a cabinet appointment by means of a political cartoon depicting Mayor Yorty at his office desk talking on the telephone while four white-coated medical attendants with concerned expressions on their faces stood around him. One orderly was holding a strait jacket behind his back while another was beckoning the mayor with his finger. The caption read, "I've got to go now . . . I've been appointed Secretary of Defense and the Secret Service men are here!" In holding that this cartoon did not impute mental instability or insanity on the mayor's part and that the cartoon was not defamatory, the court reasoned:

> "[E]ven the most careless reader must have perceived that the cartoon was no more than rhetorical hyperbole, a vigorous expression of opinion by those who considered Mayor Yorty's aspiration for high national office preposterous. To

> penalize defendants for publishing this political cartoon would subvert the most fundamental meaning of a free press, protected by the First and Fourteenth Amendments.
>
> * * *
>
> We conclude that under both state and federal law the trial court correctly determined that the cartoon was not *reasonably susceptible to a defamatory meaning* and that consequently plaintiff had failed to state a cause of action."

13 Cal. App. at 477; (emphasis added).

To require that a publication, in order to be deemed defamatory, be "reasonably susceptible" to such a meaning, clearly affords significantly greater protection to the expression of critical comment on matters of public importance than does the requirement that a publication merely contain a "possible [defamatory] implication."

Not only is the California Court of Appeal's adoption of a "possible [defamatory] implication" standard at odds with the relevant state law of California; under various decisions handed down by this Court, it clearly is impermissible as a matter of constitutional law. See, *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323 (1974); *Old Dominion Branch No. 496* v. *Austin,* 418 U.S. 264 (1974); *Greenbelt Coop. Publ. Ass'n* v. *Bresler,* 398 U.S. 6 (1970).

In *Gertz,* this Court emphasized the distinction between constitutionally protected expressions of opinion and false statements of fact:

> "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem we depend for its correction

> not in the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact."

41 L.Ed.2d at 805.

In *Old Dominion Branch No. 496,* a companion decision to *Gertz,* plaintiffs were accused in the course of a labor dispute of having "rotten principles," of "lacking character," and of being "traitors." In overturning a libel judgment against the defendants, the Supreme Court held:

> "Before the test of reckless or knowing falsity can be met, there must be a false statement of fact. *Gertz* v. *Robert Welch, Inc.,* 418 U.S. at 339-340.
>
> * * *
>
> "The . . . use of words like 'traitor' cannot be construed as representations of fact. As the Court said long before *Linn,* in reversing a state court injunction of union picketing, 'to use loose language or undefined slogans that are part of the conventional give and take in our economic and political controversies—like 'unfair' or 'fascist' —is not to falsify facts.' [Citation]. Such words were obviously used herein in a loose, figurative sense to demonstrate the union's strong disagreement with the views of those workers who oppose unionization. Expression of such an opinion, even in the most perjorative terms, is protected under federal labor law.

41 L.Ed.2d at 761-762.

In *Greenbelt Coop. Pub. Ass'n.,* the Court held that there could be no recovery based on the use of the word "blackmail," because it was clear from the context that the word was no more than "rhetorical hyperbole, a vigorous epithet" intended as criticism of the plaintiff's "public and wholly legal negotiating proposals."

26 L.Ed.2d at 15; cf. *Buckley* v. *Littel,* 394 F. Supp. 918 (1975).

In *Fram* v. *Yellow Cab Company,* 380 F. Supp. 1313 (1975), the United States District Court for the Western District of Pennsylvania granted summary judgment to the defendant—who on television had characterized plaintiff's public comments as similar to "the sort of paranoid thinking you get from a schizophrenic"—because the "typical" or "average" viewer would recognize said statement to be rhetorical hyperbole.

Similarly, in the libel action *Sellers* v. *Time, Inc.,* 423 F.2d 887 (1970), the U.S. Court of Appeals for the Third Circuit affirmed a grant of summary judgment and based its analysis on whether "the language used in the objectionable article could *fairly and reasonably be construed to*" defame. 423 F.2d at 890; (emphasis added). The court also expressly focused its attention "on the impact of the publication *on the average reader of TIME.*" Id., at 891; (emphasis added).

The federal law and the law of the state of California have firmly established, as applied to the facts underlying this action: (1) that any reference to Respondent as heartless—although an adverse characterization of Respondent's personality—is an exaggerated expression of opinion, rather than a statement of fact, and is therefore protected, *Yorty* v. *Chandler, supra; Correia* v. *Santos,* 191 Cal. App. 2d. 844 (1961); *Gertz* v. *Welch, supra; Greenbelt Coop. Pub. Ass'n.* v. *Bresler, supra; Old Dominion Branch No. 496* v. *Austin, supra;* and (2) that any implication contained in the cartoon suggesting that Respondent was responsible for the order to divert oil to Guam—despite the car-

toon caption's accurate attribution of responsibility for said order to the federal government—must be "measured, not so much by its effect when subjected to the critical analysis of a mind trained in the law, but by the natural and probable effect upon the mind of the average reader [citation]." *MacLeod* v. *Tribune Pub. Co. Inc.*, 52 Cal.2d. 536, 543 (1959). See also *Scott* v. *McDonnell Douglas Corp.*, 37 Cal. App. 3d. 277 (1974); *Yorty* v. *Chandler, supra;* Restatement (First) of Torts § 569, comment d (1938); *Greenbelt Coop. Pub. Ass'n* v. *Bresler, supra; Sellers* v. *Time, Inc., supra.*

Thus the legal analysis and, your *amicus* submits, the decision of the California Court of Appeal with respect to the defamatory nature of the political cartoon in question is clearly erroneous. The Court has employed a definitional standard of defamation which can apply to almost any statement of criticism, no matter how exaggerated, facetious or metaphorical. Clearly the press cannot be expected to perform its constitutionally protected function of vigorously disseminating news and other information to the public when faced with the prospect of liability for defamation on such an attentuated basis as "a possible [defamatory] implication."

The Court of Appeal Committed Error of Constitutional Dimension by Reversing the Trial Court's Grant of Summary Judgment Without Making Any Determination of "Actual Malice" on the Part of Petitioners

Under the New York Times standard regarding defamation of public officials—since applied to public figures, such as the Court of Appeal conceded Respondent to be—a plaintiff may not successfully maintain an action for defamation unless he raises triable issues

of fact regarding two material elements of proof: (1) that the publication was defamatory in nature; and (2) that the defendant acted either with knowledge of falsity or a reckless disregard for truth. The quality of the evidence required to raise a triable issue of fact as to "actual malice" is set forth in *Cervantes* v. *Time, Inc.*, 464 F.2d. 986 (8th Cir. 1972). There the court affirmed a summary judgment for the defendant, noting that the plaintiff had failed in his obligation "to *demonstrate with convincing clarity* that either defendant acted with knowing or reckless disregard for truth." *Id.* at 992, emphasis supplied. See also *Field Research Corp.* v. *Patrick*, 30 Cal. App. 3d. 603, 608 (1973).

The Court of Appeal below patently failed to apply the twofold requirement of the *New York Times* rule. As already discussed above, the Court erroneously ruled that it could not, as a matter of law, hold Petitioner's cartoon to be nondefamatory. Yet even assuming, *arguendo,* that the cartoon did contain false statements of fact which would reasonably tend to injure Respondent's reputation, only one of the two necessary elements of liability is established. It still must be shown that Petitioners acted with knowing or reckless disregard for truth. And the affidavits of Petitioners, uncontradicted by the Respondent, show that at no time did Petitioners act with knowing or reckless disregard for truth.

In its opinion, the California Court of Appeal spends one paragraph setting forth the applicable law under *New York Times* v. *Sullivan, et seq.,* and only one sentence applying said law to the facts herein:

> "While Respondents made a strong showing of the basis for their charge that appellant's re-

> fusal to allocate the shortfall caused a bleak Southern California Christmas, negating reckless regard [sic] of the truth or knowledge of falsity in that respect, they made no effort to demonstrate that there was any basis for a charge that appellant was in some way responsible for causing the diversion order."

Petitioners' App. A, pp. 8-9.

In effect the Court has turned *New York Times* around, by reasoning that since Petitioners failed to demonstrate some factual basis for implying that Respondent was responsible for the diversion order—an implication which Petitioners claim does not even exist in the cartoon—Respondent has raised a triable issue of fact as to whether Petitioners acted with actual malice. In fact Respondent has failed to allege any culpable conduct on Petitioners' part which would exceed "common law malice" (i.e., hatred, spite, etc.) or negligence, both of which are insufficient under *New York Times.*

Although a defendant's inability, if thoroughly tested, to demonstrate any factual basis for his defamatory statement may reflect upon his competence and/or good will, it is not "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant* v. *Thompson,* 390 U.S. 727, 731 (1968). Furthermore, it is evident beyond peradventure that the constitutional privilege established under *New York Times* is not overcome by proof of negligence, *Garrison* v. *Louisiana,* 379 U.S. 64, 79, (1964); ill will, *Beckley Newspapers* v. *Hanks,* 389 U.S. 8 (1967); or intent to inflict harm, *Henry* v. *Collins,* 380 U.S. 356 (1965).

Your *amicus curiae* respectfully wishes to emphasize that by equating the Petitioners' failure to demonstrate a factual basis for an allegedly defamatory interpretation of their political cartoon, which they have felt at all times cannot reasonably be made, with knowledge or disregard for the cartoon's defamatory nature is clearly reversible error.

The Lower Court's Disapproval of Summary Judgment in This Action Undermines a Very Necessary Means of Avoiding Unnecessary Libel Trials Which Put a Chill on the Exercise of First Amendment Rights

Although Petitioners may ultimately vindicate by means of a directed verdict their assertion that Respondent has failed to raise triable issues of material fact which would sustain a verdict of liability, the lower court's reversal of summary judgment raises concerns of far greater significance than the time and expense which will be required of Petitioners in fully litigating this action.

For the burden of proof required of a plaintiff, under the erroneous standards employed by the California Court of Appeal, in order to raise a triable issue of fact as to a publication's defamatory content and the presence of "actual malice" is so lenient as to negate substantially the special protection afforded to libel defendants under *New York Times* and severely limit the availability to a defendant of summary judgment. As a result, those persons who legitimately exercise their First Amendment right to publish critical comment on matters of public interest involving public figures or public officials, if sued within the Second Appellate District of California, may expect to face costly discovery and trial on even unfounded allegations of defamation raised by a libel plaintiff, unless

a compromise settlement can be reached. The effect thereof upon publishers dedicated to the legitimate expression of critical or unpopular social comment would be devastating.

The sheer volume of published material in this country has steadily increased. The newspaper profession has grown in both size and, due to an increased emphasis upon investigative reporting and advocacy journalism, in its impact upon public opinion. It also may be supposed that as Americans grow more numerous, as their relations with one another become more complex, and as they find themselves less able to reach their potential and goals in life solely on the basis of their individual efforts, their estimate of the worth of their reputational interests will increase. Against this background, the volume of libel suits brought and the size of damage awards in libel actions has increased dramatically in the 1960's and early 1970's, 1 A. Hanson LIBEL AND RELATED TORTS (pt. vii) (1969); Murnaghan, "From Figment to Fiction to Philosophy—The Requirement of Proof of Damages in Libel Actions", 22 Catholic University Law Review 1 (1972). This trend and the well-recognized fact that the threat of being put to the defense in a libel action may result in self-censorship that is chilling to the exercise of First Amendment freedoms should be of grave concern to all citizens generally and to this Court in particular. See *Dombrowski* v. *Pfister,* 380 U.S. 479, 487 (1965); *NAACP* v. *Button,* 371 U.S. 415, 432 (1963).

Yet regardless of the substantive threat to free speech posed by unfounded civil libel actions, many courts expressly disfavor summary judgment, particularly on issues such as "actual malice" which involve a defendant's state of mind. See *Ragano* v. *Time, Inc.,*

302 F. Supp. 1005, 1010 (D.C. Fla. 1969), affirmed 427 F.2d 324 (2nd Cir. 1969), cert. den. 396 U.S. 1049; *Fignole* v. *Curtis Pub. Co.,* 247 F. Supp. 595 (D.C. N.Y. 1965); *cf., Poller* v. *C.B.S. Inc.,* 368 U.S. 464 (1962); Wright & Miller, FEDERAL PRACTICE AND PROCEDURE, § 2712, fn. 54 (1973).

Your *amicus* respectfully wishes to emphasize that Respondent has failed to raise a genuine issue of fact bearing on the question whether Petitioners herein published with knowing or reckless disregard for truth. Petitioners therefore are entitled to judgment now and should not be put to the burden and expense of litigating this action. In the Second Appellate District of California as well as the rest of the United States, "[s]ummary judgment serves important functions which would be left undone if courts too restrictively viewed their power. * * * In the First Amendment area, summary procedures are even more essential." *Washington Post Co.* v. *Keogh,* 365 F.2d 965, 967-968 (U.S. App. D.C. 1966), cert. den., 385 U.S. 1011. ANPA therefore urges this Court to reaffirm the very necessary role summary judgment plays in the summary disposition of unfounded libel actions alleging defamation of public figures and public officials.

CONCLUSION

Your *amicus* has attempted to elucidate for this Court the very significant First Amendment issues surrounding the California court's decision below. The constitutional infirmity of that decision is evident. ANPA recognizes, however, that this Court may be inclined to reject the Petition herein because Petitioners may ultimately prevail on their claim of privilege by means of a directed verdict or favorable ver-

dict from the jury at trial. Your *amicus* respectfully requests this Court to resist that inclination. To uphold or refuse to consider the reversal of summary judgment in this matter, which would result in expensive and time consuming litigation, can only serve to cause uncertainty and timidity in those who, through political cartoonists, employ symbolism and caricature to express meaningful social comment and criticism. It would contribute to an atmosphere in which the open, uninhibited and robust exercise of First Amendment freedoms cannot long survive.

For the reasons stated herein it is respectfully urged that this Court grant the Petition for Writ of Certiorari in order that the substantial constitutional questions raised therein can be fully examined.

Respectfully submitted,

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